

APPEAL NO. 042393  
FILED NOVEMBER 15, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 11, 2004. The hearing officer determined that the appellant's (claimant) impairment rating (IR) was 10% as assessed by a required medical examination (RME) doctor.

The claimant appealed, contending that the designated doctor's 20% IR had presumptive weight and that the hearing officer improperly rejected the designated doctor's report. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, and that the claimant reached maximum medical improvement on September 29, 2003. It is undisputed that the proper edition used in calculating the IR is the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). It is also undisputed that the claimant had two-level spinal fusion surgery at L4-5, L5-S1 "in April of 2002."

The designated doctor Dr. J examined the claimant on September 29, 2003, and assessed a 20% IR pursuant to Diagnosis-Related Estimate (DRE) Lumbosacral Category IV: loss of motion segment integrity (LMSI). LMSI "is defined as at least 5 mm of translation of one vertebra on another, or angular motion at the involved motion segment that is 11° more than that at an adjacent motion segment." Dr. J, in his report does not indicate, if or how, he found LMSI.

The claimant was examined by Dr. W the RME doctor on November 3, 2003, and in a report dated November 6, 2003, commented on preoperative flexion and extension films. Dr. W disagreed with Dr. J on the IR stating that the claimant does not have multilevel neurological compromise and that "one cannot make this diagnosis [LMSI] on this patient's preoperative films." Dr. W states he measured the films and the measurements were "not more than 5 mm translation." Dr. W assesses the claimant with DRE Category III 10% IR. Two letters of clarification from the designated doctor were requested (one dealt with ability to work and is not applicable here). In an undated response regarding the claimant's IR, the designated doctor simply replied without further elaboration:

Per advisory 2003-10, "multilevel fusion meets the criteria for DRE Category IV. . . as this multilevel fusion is equivalent to multilevel spine

segment structure compromise,” awarding a 20% whole person impairment.

This response was sent to Dr. W, who in a reply dated March 4, 2004, addressed Texas Workers' Compensation Commission (Commission) Advisory 2003-10 signed July 22, 2003, and commented that the designated doctor failed to consider that Advisory 2003-10 only applied:

“if preoperative x-rays were not performed. In this case preoperative x-rays were performed. They did not show multilevel instability.”

In a report dated May 10, 2004, Dr. W did a repeat RME, commented on the prior correspondence and repeated “the new ruling or dictum [Advisory 2003-10] is that if no x-rays were taken the patient’s [sic] with fusions should be in DRE Category IV. This patient did have x-rays. It did not show an unstable spinal segment.”

The hearing officer commented that “the provision cited by [Dr. J] as justification for his 20% IR clearly does not apply when preoperative x-rays at flexion and extension are available, and clearly they were here.” The hearing officer then found that Dr. J failed to properly apply the AMA Guides in arriving at his IR certification and therefore his rating is contrary to the great weight of other medical evidence. The hearing officer then adopted Dr. W’s 10% IR.

The claimant’s appeal first complains that the hearing officer erred in determining that the claimant did not have a cervical injury. The hearing officer made no such finding and merely commented on the doctor’s rating of the lumbosacral injury. The claimant then asserts that the designated doctor’s opinion has presumptive weight and that the hearing officer failed to clearly state how the other medical evidence is contrary to the designated doctor’s opinion. We disagree. The hearing officer precisely set out the reason that he rejected the designated doctor’s report, that being that the designated doctor failed to apply the AMA Guides for verification of a DRE Lumbosacral Category IV and that Commission Advisory 2003-10 was not applicable because there were preoperative flexion/extension x-rays.

Commission Advisory 2003-10 provides, in part:

2. Clarification of Rating for Spinal Fusion(s).

If preoperative x-rays were not performed, the rating may be determined using the following criteria:

\* \* \* \*

b. Multilevel fusion meets the criteria for DRE Category IV, Structural Inclusions, as this multilevel fusion is equivalent to “multilevel spine segment structural compromise” per DRE IV.

In Texas Workers' Compensation Commission Appeal No. 041429-s, decided August 4, 2004, the Appeals Panel considered a similar situation where the designated doctor in that case had applied Advisory 2003-10 even though there were presurgery roentgenograms and stated that under Advisory 2003-10 a rating for multilevel spinal surgery under subsection b is permissible "if preoperative x-rays were not performed." In this case preoperative x-rays were performed and the hearing officer accepted Dr. W's interpretation that the x-rays did not show LMSI.

We have reviewed the claimant's assertions on appeal and conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Legion Insurance Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR  
9120 BURNET ROAD  
AUSTIN, TEXAS 78758.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge